Williams-Sonoma Direct, Inc. ***and*** **International Brotherhood of Teamsters, Local 63, Petitioner.** Case 21–RC–176174

January 9, 2017

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The Petitioner's request for review of the Regional Director's Decision and Order, which is attached as an appendix, is denied as it raises no substantial issues warranting review.[1]

Dated, Washington, D.C. January 9, 2017

Mark Gaston Pearce, Chairman

Philip A. Miscimarra Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND ORDER[1]

Petitioner seeks to represent a unit of merchandise processors, lead merchandise processors, merchandise processors-forklift, lead merchandise processors and merchandise processors in departments 3149, 3205, 3206, 3208, 3210, 3212, 3234, 3236, 3237, and 3239,[2] employed by the Employer at its facility located in Walnut, California.

A hearing officer of the National Labor Relations Board (Board) held a hearing in this matter on May 24 and 25, 2016. As explained below, based on the record and relevant Board law, I am affirming the hearing officer's rulings, but I find that the record evidence is insufficient to establish that the petitioned-for unit is an appropriate bargaining unit within the meaning of Section 9(c)(1) of the Act. I am, therefore, dismissing the petition.

The Hearing

Pursuant to Section 102.63(b)(3) of the Board's Rules and Regulations, the Employer filed a statement of position with the Region by noon on May 20, 2016, the day before the hearing was originally scheduled to begin, in which it contends that the petitioned-for unit is inappropriate.[3] However, the Employer failed to timely serve its statement of position on the Petitioner, as required by Section 102.63(b)(3) of the Rules and Regula-

[1] Our denial of the request for review "constitute[s] an affirmance of the regional director's action," i.e., the dismissal of the petition. Board's Rules and Regulations, Sec. 102.67(g). In denying the Petitioner's request for review, we do not adopt the decision of the Regional Director as the Board's own decision. We agree, however, that under Sec. 102.66(d) of the Board's Rules, the Regional Director was correct to preclude the Employer from litigating the appropriateness of the petitioned-for unit (based on the Employer's failure to timely serve its statement of position on the Petitioner). By contrast, we need not decide whether the Regional Director correctly denied the parties' joint stipulation to include the record from Case 21–RC–169662, because that ruling was at most a harmless error. Having denied the Petitioner's request for review, we find it unnecessary to consider the Employer's conditional request for review.

In response to our concurring colleague's characterization of *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016), we note our reliance in that case on the peculiar circumstances by which the contract-bar issue was raised and confirmed by the parties apart from the union's statement of position, and reiterate that the majority decision speaks for itself, see, slip op. at 3 fn. 5.

Member Miscimarra concurs in the denial of review except he believes three issues warrant explanation. First, Member Miscimarra notes that the instant case involves another example where the Board finds it was entirely appropriate for the Regional Director to evaluate and resolve a dispositive election issue (here, the inappropriateness of the petitioned-for unit), even though the outcome favors a party that failed to comply with the statement of position requirement set forth in the Board's Election Rule (79 Fed. Reg. 74308 (Dec. 15, 2014)). See *Brunswick Bowling Products, LLC*, 364 NLRB No. 96, slip op. at 3 (2016) (Member Miscimarra, concurring in part and dissenting in part) ("[T]oday's decision rightly places substance over form."). In *Brunswick*, the Board upheld the Regional Director's finding that a decertification petition was barred by an existing collective-bargaining agreement, resulting in the petition's dismissal, even though the union did not timely serve its statement of position raising the "contract bar" defense. Second, Member Miscimarra agrees with his colleagues' decision not to reach or pass on the Employer's conditional request for review, which involves the Employer's failure to timely serve its statement of position on the Union. Third, Member Miscimarra agrees that the petitioned-for unit is inappropriate, but he relies on traditional community-of-interest standards rather than *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), for the reasons stated in *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 22, 31–32 (2014) (Member Miscimarra, dissenting). More generally, Member Miscimarra continues to adhere to his dissenting views regarding the Election Rule, including his objections to the statement of position requirement and the preclusion principle. See Election Rule, 79 Fed. Reg. at 74430–74460 (dissenting views of Member Miscimarra and former Member Johnson); id. at 74442–74444 (dissenting views regarding the statement of position requirement).

[1] The name of the Employer was corrected at the hearing.

[2] The Petitioner moved to amend the petition at the hearing to add the classification of merchandise processor(s) and to substitute department 3210 for 3238. Pursuant to my ruling, the hearing officer permitted the amendments.

[3] Although the hearing was originally scheduled to begin on May 23, 2016, at the Employer's request the hearing was postponed to May 24, 2016.

tions. In fact, the Employer did not serve Petitioner with its statement of position until after noon on May 23, 2016, the day the hearing was originally scheduled to begin.

Section 102.66(d) of the Board's Rules and Regulations precludes an employer from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue, except regarding the Board's statutory jurisdiction, where the employer has failed to timely serve its statement of position on the petitioner.

In view of Section 102.66(d), at my direction, the hearing officer refused to permit the Employer in this case to litigate any issues raised in its statement of position concerning whether the petitioned-for unit is an appropriate unit.[4] I hereby affirm my ruling, and find that the Employer was properly precluded from litigating the unit issue based on its failure to timely serve its position statement on the Petitioner.

Notwithstanding the preclusion, the hearing officer, per instructions from the Regional Director, admitted the Employer's statement of position into the record with no objection from the parties. That statement of position included a commerce questionnaire, which showed that in the previous fiscal year, a representative period, the Employer derived gross revenues in excess of $500,000, and purchased and received at its California facilities goods valued in excess of $50,000 directly from points located outside the State of California. The Employer operates a chain of retail stores with a distribution warehouse in Walnut, California.

In addition, pursuant to Section 102.66(c) of the Board's Rules and Regulations, the hearing officer permitted the Employer to make an oral and written offer of proof with regard to whether the petitioned-for unit is an appropriate unit. Based on my ruling on preclusion, the hearing officer, per my directive, did not receive the evidence described in the Employer's oral and written offer of proof.

Testimony was received from a representative of Petitioner that was sufficient to establish that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. In addition, some limited testimony was received from current employees of the Employer regarding the work they performed and their own terms and conditions of employment.[5] These witnesses were called to testify by the Petitioner.

[4] During the hearing the Employer filed with the undersigned Regional Director a request for permission to file an appeal of the ruling on preclusion and an appeal of the ruling. I granted the request, and denied the appeal. Also, during the hearing, after the Petitioner was allowed to amend the petition, the Employer requested that it be allowed to amend its position statement. I denied the request.

[5] At the hearing, the Employer requested that the undersigned Regional Director take administrative notice of the record in Case 21–RC–169662. I refused to take such administrative notice. That case involved a previous petition filed by the Petitioner to represent a smaller unit of the Employer's employees. That petition was subsequently withdrawn by the Petitioner. At the hearing in this case, the Employer and the Petitioner jointly stipulated to including the record in Case 21–RC–169662 into this proceeding. However, that stipulation was rejected, and the record in Case 21–RC–169662 was not received into evidence. At the Employer's request, it was placed in the rejected exhibit file.

A. Board Law

Before conducting an election, Section 9 of the Act obliges the Board to make a determination whether the petitioned-for unit is appropriate for collective bargaining. When parties refuse to stipulate as to the appropriateness of the unit, the Board is required to take evidence and make a determination of whether the employees in the petitioned-for unit share a sufficient community of interest to warrant inclusion in the unit. As aptly put by the Board in *Allen Health Care Services*, 332 NLRB 1308, 1309 (2000), "The Board has an affirmative statutory obligation to determine the appropriate bargaining unit in each case."

The Board considers many factors in determining whether employees in a petitioned-for unit form a sufficiently identifiable group to form an appropriate bargaining unit. In *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 2 (2014), the Board held:

> In determining whether a petitioned-for unit is appropriate, the Board weighs various community-of-interest factors, including whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. Id. at 9, quoting *United Operations, Inc.,* 338 NLRB 123, 123 (2002). More than one appropriate bargaining unit can usually be defined from any particular factual setting, and the petitioned-for unit need only be an appropriate unit, not necessarily "*the* single most appropriate unit." Id., quoting *American Hospital Assn.,* 499 U.S. 606, 610 (1991) (emphasis in original).

In analyzing the various factors, the Board compares the employees in the petitioned-for unit with the rest of the employees of the employer. Thus, in *Bergdorf Goodman*, the Board compared the terms and conditions of employment of employees who sold shoes in two departments of the store with employees in the rest of the store in order to determine whether the employees in the petitioned-for unit shared a sufficient community of interest to justify a separate bargaining unit. While noting that the employees who sold shoes in two different departments shared some community of interest with each other, including a different wage structure from the rest of the employees in the store, the Board held that their community of interest was insufficient. In finding that the employees in the petitioned-for unit did not share a sufficient community of interest, the Board citing *Specialty Healthcare*, 357 NLRB 934 (2011), considered it significant that the petitioned-for unit did not conform to any organizational structure of the Employer.

B. Application of Board Law

In the instant case, the Employer was precluded from raising any issues or presenting any arguments concerning the appropriateness of the petitioned-for unit. Therefore, there was no valid challenge to the appropriateness of the petitioned- for unit. The Board must nonetheless assess whether the petitioned-

for unit is an appropriate unit.

The record contains some evidence that the employees in the petitioned-for unit have conditions of employment in common with each other. Therefore, they do share some community of interest with each other. However, I am unable to determine whether the employees in the petitioned-for unit form the requisite readily identifiable group separate from the rest of the Employer's workforce. Notably, the record fails to establish whether they have, or do not have, conditions of employment in common with other employees who are not part of the petitioned-for unit.

For example, the record contains evidence that employees in the petitioned-for unit are paid by the hour, but fails to establish how other employees at the facility are paid and whether they are paid at the same rate. Similarly, while the record contains evidence that employees in 10 enumerated departments pick orders and move product to trucks and back, it fails to establish whether the employees in the petitioned-for unit are the only employees who perform that function and what work is performed by the other employees in the 10 departments included in the petitioned-for unit.

Like the proposed unit in *Bergdorf Goodman*, the petitioned-for unit does not seem to follow the Employer's organizational structure. Rather, it appears that there are employees other than employees in the petitioned-for unit who work in the departments listed in the petition.

Accordingly, I find that the record evidence is insufficient to establish whether the employees in the petitioned-for unit constitute an appropriate unit.

C. Findings and Conclusions

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Therefore, upon the entire record in this proceeding, and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

ORDER

It is hereby ordered that the petition is dismissed.

Right To Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: June 7, 2016